

# ALTERNATIVE DISPUTE RESOLUTION

*Law & Practice*



*Edited by*

Adnan Yaakob

Ashgar Ali Ali Mohamed

Arun Kasi

Mohammad Naqib Ishan Jan

Muhamad Hassan Ahmad

**CLJ Publication**

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ALTERNATIVE DISPUTE RESOLUTION : Law & Practice / Edited by:

Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib

Ishan Jan, Muhamad Hassan Ahmad.

ISBN 978-967-457-144-3

1. Dispute resolution (Law).

2. Dispute resolution (Islamic law).

I. Adnan Yaakob.

II. Ashgar Ali Ali Mohamed.

III. Arun Kasi.

IV. Mohammad Naqib Ishan Jan.

V. Muhamad Hassan Ahmad.

347.09

**Published by**

**The Malaysian Current Law Journal Sdn Bhd**

Unit E1-2, BLK E, Jln Selaman 1

Dataran De Palma, 68000 Ampang,

Selangor Darul Ehsan, Malaysia

Co No 197901006857 (51143 M)

Tel: 603-42705400 Fax: 603-42705401

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Kumitha Abd Majid (*Publications Editor*)

Suhainah Wahiduddin (*Indexing*)

Nurhamimi Mohamad (*Cover Design*)

Afrihidayati Asep Hidayat (*Typesetting*)

**Printed by**

VIVAR PRINTING SDN BHD

Lot 25, Rawang Integrated Industrial Park,

48000 Rawang,

Selangor Darul Ehsan

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## CHAPTER 10

### MEDIATION: COURT ANNEXED\*

#### Introduction

Mediation as an alternative to traditional litigation would be suitable for claims involving personal injuries and other damages claims due to road accidents or any other tortious acts, claims for defamation, matrimonial disputes, commercial disputes, contractual disputes, and intellectual property cases. It is also suitable in other cases such as employment, probate and estate, professional malpractice, negligence claims, information technology, admiralty, tenancy, tax and costs, among others. Mediation can also be opted in some categories of criminal cases particularly, cases involving complaints against person or property for example, assault, traffic offences and harassment cases, among others. Having said the above, this chapter discusses on the application of mediation in the ordinary courts of law in Malaysia with reference to civil matters.

At this juncture, it is worthwhile to note that the ordinary courts of law or civil courts in Malaysia are divided into the superior courts and subordinate courts. The superior civil courts comprise of the Federal Court, the Court of Appeal and the two High Courts namely, the High Court of Malaya and the High Court of Sabah and Sarawak. Meanwhile the subordinate civil courts comprise of the Sessions Court,

---

\* This chapter is contributed by Ashgar Ali Ali Mohamed and Muhammad Noor Firdaus Rosli.



First Class Magistrates' Court and Second Class Magistrates' Court. Generally, some of the above-mentioned courts are conferred with only original jurisdiction while others have several types of jurisdiction such as original, appellate, supervisory and revisionary, referential and advisory jurisdictions. Some courts may have specialised jurisdiction to only hear certain matters.

### **Mediation Act 2012**

---

In order to promote and encourage a more uniformed process of mediation across the institutions and private mediators, the Mediation Act 2012 was enacted. This Act generally governs mediation in Malaysia with the exception of court-led mediation. The objective of this Act is 'to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.' This Act however is not applicable to any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court. Section 4 of the 2012 Act states that 'mediation under this Act shall not prevent the commencement of any civil action in court or arbitration nor shall it act as a stay of, or execution of any proceedings, if the proceedings have been commenced.'

### **Practice Direction No. 5 Of 2010**

---

In order to encourage mediation in civil courts, the Practice Direction No. 5 of 2010 which came into effect on the 16 August 2010, formally introduced mediation in the civil High Courts and Subordinate Courts. It was issued on the directive of the Chief Justice of Malaysia to encourage disputants to embrace mediation for all civil and commercial cases without having to go through or to complete a trial or appeal. The Judges and Judicial Commissioners of the High Court, Deputy and Senior Assistant Registrars of the High Court, Sessions Court Judges and Magistrates are given directions at the pre-trial case management stage to encourage the parties to use mediation for the settlement of their disputes.

The parties are allowed to choose either a judge-led mediation or a mediator agreeable to both the parties. The practice direction also provides that the mediation opted by the parties must be completed within a period of three months from the date the case is referred for mediation. The period may however be extended with the approval of the Court. The objective of the practice direction is mentioned in para 2.1 as follows:

... to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal. The benefit of settlement by way of mediation is that it is accepted by the parties, expeditious and it is final.

Alongside with the practice direction, the Kuala Lumpur Court Mediation Centre was established, in essence to provide the free-of-charge mediation services conducted by judges or judicial officers. An eight-page document issued by the Centre contains the guideline on mediation services offered by the Centre. The Centre has since changed its name to the Court-Annexed Mediation Centre Kuala Lumpur which is situated inside the Kuala Lumpur Court Complex.<sup>1</sup> A brochure entitled 'The Court-Annexed Mediation Centre Kuala Lumpur – a positive solution' replaced the previous eight-page document.<sup>2</sup>

Further, O. 34 r. 2(2) of the Rules of Court 2012 ('ROC 2012') which replaced the Rules of the High Court 1980 and Subordinate Courts Rules 1980, specifically provides that, the Court may, at a pre-trial case management consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including mediation in accordance with any practice direction for the time being issued.

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1 Court-annexed mediation refers to the situation where a judge and judicial officers act as mediator to litigating parties after they have filed their action in the court.

2 'Kuala Lumpur Court Mediation Centre, Court-Annexed Mediation', see <https://www.aseanlawassociation.org/11GAdocs/workshop5-malaysia.pdf>.

Again, O. 59 r. 8(c) of the ROC 2012 provides that in the exercise of discretion as to costs, the court, shall take into account, the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution.

It is also noteworthy that the pre-trial case management is an important stage before the matter is set down for trial. During this stage, the trial judge will give such directions as necessary for the future conduct of the action in order to ensure just, expeditious and economical disposal of the matter. Usually, the following directions are given during a case management:

- (1) directing the parties to mediate their dispute, before setting the case down for litigation, or offering mediation services to the parties with a view of speedy disposal of the dispute;
- (2) directing the parties to furnish particulars of their claim and/or the filing of pleadings;
- (3) requiring the parties to formulate and settle the principal issues requiring determination at the trial;
- (4) ordering the parties to deliver their respective list of documents that may be used at the trial of the action;
- (5) directing the parties to furnish to the court and to exchange between themselves, a bundle containing each of their respective documents;
- (6) directing the parties to file and exchange the bundle of documents;
- (7) directing the parties to exchange and file a statement of agreed facts;
- (8) limiting the number of witnesses that each party to the action may call at the trial;

- (9) ordering the administration of interrogatories;
- (10) fixing a date for the hearing of the action;
- (11) directing the parties to file the witness statements, for example, when there is difficulty in tracing the witnesses; and
- (12) dealing with all the applications for amendments to the pleadings, among others.<sup>3</sup>

### **Practice Direction No. 2 Of 2013**

Apart from the above, the Practice Direction No. 2 of 2013 on 'Mediation Process for Road Accident Cases in Magistrate's Courts and Sessions Courts' issued by the Chief Justice of Malaysia, requires all personal injury claims arising from motor vehicle accidents to undergo compulsory mediation before a Court Mediation Officer (who is either a Sessions Court Judge or a Magistrate, other than the presiding Sessions Court Judge or Magistrate who is handling the matter).<sup>4</sup> The practice direction which took effect on 1 March 2013 is applicable to cases filed after the aforesaid date. For a district with only a Judge or a Magistrate stationed, another Judge or Magistrate from other station shall come and assume the role of the Court Mediation Officer. The mediation is

<sup>3</sup> See Justice Abdul Malik Ishak 'Summons for Directions and Other Related Issues Together with Case Management: A Synopsis' [2004] 3 CLJ liii.

<sup>4</sup> Accident claims are tried in either the Magistrate Court or Sessions Court, where the former has jurisdiction for claims for RM100,000 or less, while the Sessions Court has unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents. See ss. 65 and 90 of the Subordinate Courts Act 1948.

required to take place once the pleadings<sup>5</sup> are closed and not later than ten weeks after the claim is filed, where the basic documents such as initial medical report, sketch plan prepared by the police investigating officer, police reports lodged by parties, photos (if available) as well as other supporting documents. It is worthwhile to note that the 2013 Practice Direction is not affected and unperturbed by the issuance of the Practice Direction No. 4 of 2016.

### Practice Direction No. 4 Of 2016

The Practice Direction No. 4 of 2016 was issued by the Chief Justice of Malaysia, superseding and revoking Practice Direction No. 5 of 2010. The 2016 practice direction which came into effect on 15 July 2016, in principle regurgitated the essence of the 2010 practice direction, with addition of more comprehensive features. The objective of this Practice Direction is to encourage parties to resolve their disputes without going through the process of trial and appeals. It permits the judges to suggest to the parties the alternative modes of dispute settlement so long as such suggestions or directions are acceptable to the parties. Mediation which previously required to be completed not later than

5 Pleadings are referred to as a set of documents which the parties to civil proceedings are required to exchange. It comprises of the statement of claim, statement of defence and the reply. The above documents should contain concise statements of all material facts on which the parties rely on for the purposes of establishing a claim or defence. The material facts must be as brief as the nature of the case allows. The object or the purpose of pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Commodore Pty Ltd v. Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1984] 1 NZLR 324 (NZ). Primarily, it is intended to highlight to the opponent the issues that are being used in support of one's case. In *Philips v. Philips* [1878] 4 QBD 133, 139, Cotton LJ aptly stated:

'in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.'

three months from the date the case is referred for mediation (except with the agreement of the Court), is now permitted to be carried out at any stage, before a trial, at the pre-trial case management, or even after a trial has commenced or when the case reaches the appeal stage.

## **Referrals To Mediation**

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Paragraph 5.1 of Practice Direction No. 4 of 2016 provides three modes of referral to mediation namely, the Judge-led mediation, mediation provided by the Kuala Lumpur Regional Centre for Arbitration (now known as the Asian International Arbitration Centre ('AIAC')) and external mediator agreeable to both parties. If a judge is able to identify issues arising between the parties that may be resolved amicably, he would highlight those issues to the parties and suggest how these issues may be resolved. The judge can request the parties to meet him in his chamber in the presence of their counsel, and suggest mediation to the parties.<sup>6</sup> If they agree to the mediation then the parties will be asked to decide whether they would wish the mediation to be judge-led, by the AIAC or by other mediators agreeable to both parties. The procedure for these three modes as contained in the 2016 Practice Direction's annexures A, B and C, respectively are discussed below.

### **Judge-led Mediation**

In this process, a judge would assist the disputing parties to resolve their disputes amicably. A judge-led mediation could, apart from avoiding litigation, significantly save the court's judicial time. Certainly, a judge mediating the dispute would indirectly influence the parties

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<sup>6</sup> The High Court ordered the parties involved in the Pahang Menteri Besar Datuk Seri Adnan Yaakob's defamation case against Utusan Melayu (M) Bhd to settle through mediation. If the mediation fails, the case would proceed to trial. See 'Court orders mediation for Pahang MB vs Utusan case' 17 July 2017 at <http://www.themalaysiantimes.com.my/court-orders-mediation-pahang-mb-vs-utusan-case/>.

to take mediation more seriously. Annexure A provides that a judge hearing the case should not also mediate the dispute but he should pass the case to another judge for mediation. The mediation procedure to be followed must be in the manner acceptable to both parties. Unless otherwise agreed to by the parties, the judge will not see the parties without their lawyers' presence except in cases where the parties are not represented. Where the mediation is successful in mutually resolving the dispute, the judge mediating shall record a consent judgment on the terms agreed by the parties. But if the mediation fails, the matter will then be reverted to the original judge to hear and complete the case.

### Mediation By The AIAC

Parties can opt to have their case mediated under the auspices of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) which has been newly branded as the AIAC, popularly depicted as the forerunner of international arbitration in Southeast Asia.<sup>7</sup> Annexure B provides that if parties decide to seek mediation services provided by the AIAC, the plaintiff's solicitor is required to notify in writing to the AIAC within seven calendar days and upon receipt of the notification, the AIAC shall then proceed with mediation in accordance with the AIAC Mediation Rules that is in force at the material time. The AIAC Mediation Rules (formerly known as 'KLRCA Mediation Rules') are a set of procedural rules encompassing different aspects of the process of mediation to aid parties in resolving both international and domestic disputes.

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7 The KLRCA was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation.

### Mediator Chosen By Parties

Parties to a dispute can at any time refer their dispute to a private mediator of their choice. Annexure C provides that the parties may agree to mediate the dispute by appointing a mediator from the list of certified mediators furnished by the Malaysian Mediation Centre ('MMC') set up under the auspices of the Bar Council<sup>8</sup> or any other mediator agreeable by the parties. The MMC mediators are drawn from a panel of lawyers and professionals, who are trained as mediators. To use the services offered by the MMC, the parties will be required to pay the requisite fees for mediation.<sup>9</sup> The private mediation is, however, still subject to the provisions as provided in the Mediation Act 2012.

Further, the parties may, if they so desire, appoint more than one mediator to resolve their dispute. In the event the parties are unable to agree to the appointment of a mediator, the MMC shall proceed to

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- 8 The Bar Council has set up the MMC in Kuala Lumpur with the objective of promoting mediation as a means of ADR, and to provide a proper avenue for successful dispute resolutions. The MMC operates under a set of Mediation Rules and Code of Conduct formulated for a variety of matters relating to mediation, including the cost of such a mediation process. On the mode of registering the dispute for mediation with the MMC, see at [http://www.malaysianbar.org.my/How\\_does\\_one\\_go\\_about\\_registering\\_a\\_matter\\_for\\_Mediation.html](http://www.malaysianbar.org.my/How_does_one_go_about_registering_a_matter_for_Mediation.html). As for the questions, 'who should regulate'; 'what are the reasons for accreditation and what are the benefits that it can deliver'; 'how should regulation be accomplished and the issues that come with it'; 'what qualifications are required'; and 'should it be obligatory or optional for mediators to be accredited', etc., see also Mohammad Naqib Ishan Jan, Ashgar Ali Ali Mohamed *Mediation in Malaysia: The Law and Practice* (2010) Ch 28.
- 9 MMC's rates are as follows: Mediator's fees: RM1,500 per day (regardless of the quantum of claim); Administrative fees: RM300 per case; and Room Rental: RM350 per day, if MMC's premises are being utilised. A pre-mediation conference will be conducted without any charge: at [http://www.malaysianbar.org.my/notices\\_for\\_members/practice\\_direction\\_no\\_5\\_of\\_2010\\_on\\_mediation.html](http://www.malaysianbar.org.my/notices_for_members/practice_direction_no_5_of_2010_on_mediation.html).



appoint a mediator from its Panel of Mediators in order to proceed with the mediation process.<sup>10</sup> Any mediator so chosen by the parties or appointed by the MMC may agree to be bound by the MMC Code of Conduct and the MMC Mediation Rules. If parties agree to be bound by the MMC Mediation Rules, upon direction of the Court, the plaintiff's solicitor shall, within seven calendar days notify in writing to the MMC. Upon receiving such notification, the MMC shall then proceed with the mediation process as provided under the MMC's Mediation Rules.

Having said the above, it is worthwhile to note that in a judge-led mediation or where a mediator is selected by the parties, the mediator so appointed shall facilitate negotiation between the parties in the dispute and steer the direction of the mediation session with the aim of finding a mutually acceptable solution to the dispute. The mediator's main role is to listen to the arguments put forward by the parties and possibly ask questions to help the disputants understand the issues. The mediator would then explore the strength of the parties' case with a view of reconciling the parties' positions and assisting them in reaching a consensus on the resolution of the dispute. Further, he would guide the parties through the process to develop a mutually acceptable solution. The mediator may offer suggestions, recommendations and alternatives for consideration by the parties as a means of resolving the dispute. However, the mediator has no power to compel or even recommend a resolution or settlement. The process works because the parties are given the power and obligation to seek solutions that meet their own needs and interests.

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10 Currently, a total of 324 accredited mediators are registered with the Bar Council MMC, see at <http://www.malaysianmediationcentre.org/about-us/list-of-accredited-mediators>.

## Mediation Agreement

When the parties agree to mediate, para. 6 of the 2016 Practice Direction provides that each of the parties shall complete the mediation agreement as in 'Form 1' as follows.

### AGREEMENT TO MEDIATE

Case No .....

Judge/ Mediator .....

Parties: Plaintiff

.....

Defendant

.....

Third Party:

.....

Mention /Hearing Date:

.....

We, the solicitors representing the above mentioned parties hereby consent to refer this matter for mediation for the purpose to reach an amicable settlement and to the satisfaction of all parties.

We also agree that all disclosures, admissions and communications made under a mediation session are strictly 'without prejudice'. Such communications do not form part of any record and the mediator shall not be compelled to divulge such records or testify as a witness or consultant in any judicial proceeding, unless all parties to both the Court proceedings and the mediation proceedings consent to its inclusion in the record or to its other use.

.....

(Plaintiff's Solicitor's Signature)

.....

(Defendant's Solicitor's Signature)

.....

(Third Party's Solicitor's Signature)

Dated:

## Confidentiality

All communication, disclosures and admission between the parties at the mediation session are 'privileged' and may not be discussed or divulged to third parties including the courts. The primary purpose of this privilege is to encourage the parties to discuss fully and frankly their case. Paragraph 6.2 of the 2016 Practice Direction provides *inter alia*, that all disclosures, admissions and communications made under a mediation session are strictly 'without prejudice'.<sup>11</sup> Such communications do not form part of any record and the mediator shall not be compelled to divulge such records or testify as a witness or consultant in any judicial proceeding, unless all parties to both the court proceedings and the mediation proceedings consent to its inclusion in the record or to its other use.<sup>12</sup> Therefore, in the event mediation fails to resolve the dispute and the matter is referred to the court, the court need only concern itself with the facts of the case and not what transpired at the mediation proceedings.

## Period And Results Of Mediation

Paragraph 6.3 of the Practice Direction provides *inter alia*, that unless otherwise ordered by the court, all mediation sessions must be completed not later than three months from the date the case is referred for mediation. The parties are required to report to the court on the progress of mediation and/or the outcome of such mediation not

11 According to Lindley LJ in *Walker v. Wilsher* (1889) 23 QBD 335 at 337, 'without prejudice' 'means without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.' Section 23 of the Evidence Act 1950 is concerned with communication either oral or written that pass between parties to a civil dispute with a view to settling their dispute under the provision of 'without prejudice' privilege.

12 See *Alex Nandaseri De Silva v. Sarath Wickrama Surendre* [2013] 10 CLJ 52, HC.

more than one month from the date the case is referred to mediation.<sup>13</sup> However, if the mediation fails to resolve the dispute, the court shall, on the application of either of the parties or on the court's own motion, give such directions as the court deems fit.

## Settlement Agreement

When the parties agree to an amicable settlement, the mediator would prepare a draft settlement agreement and submit the same to the parties for their consideration and approval. The terms may then be subject to changes or adjustments, having regard to the comments or requests of the parties. Alternatively, the parties may themselves decide to prepare the settlement agreement and the mediator may assist them whenever requested by the parties. The settlement agreement shall, when duly executed, bind the parties, and thereafter the dispute between them shall cease to exist. Thus, the obligations undertaken by the parties vide the settlement agreement shall henceforth become binding upon them. The parties would be required to record the terms of the settlement as a consent judgment. The parties will appear before a judge whom the case was allocated to originally have a consent judgment<sup>14</sup> recorded as per terms of settlement; or in the event parties do not wish the terms to be made known to the public, to have a consent judgment recorded by the judge or court without disclosing the terms of the settlement.<sup>15</sup>

13 In *Andamy Plantations Sdn Bhd v. Turus Saladou & Ors* [2002] 6 CLJ 201 at 206, Richard Malanjum J (as he then was) stated: 'Once the parties inform the court that an amicable settlement has been reached I do not think it is the business of the court to find out the reason or reasons. Indeed that is the very essence in mediation as an alternative mean to dispute resolution'.

14 A consent judgment or order is an agreement entered into by the parties which is subsequently recorded by the presiding judge. The consent judgment or order shall thereon bind the parties. See Ashgar Ali Ali Mohamed 'Consent Judgment or Order' Malaysian Court Practice Bulletin 2008 (Issue 4) 1.

15 See *Alex Nandasari De Silva v. Sarath Wickrama Surendre* [2013] 10 CLJ 52, HC.

## Practice Direction To Be Followed Closely

Having said the above, it is worthwhile to note that although the practice direction has no statutory authority, the directive must be followed closely. In *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal*,<sup>16</sup> the court noted *inter alia*, that the practice directions were effected for administrative purposes, providing guidelines for a more effective implementation of the rules of court. Therefore, once a practice direction has been properly and legally issued, they must be adhered to. Again, in *Capital Insurance Bhd v. Kasim Mohd Ali*,<sup>17</sup> Mokhtar Sidin JCA (as he then was), delivering the judgment of the Court, stated:

In our view the rules and practice directions made by this court are to be obeyed and not to be broken. We would like to stress here that parties to an appeal must adhere and comply strictly to those rules and directions. Of late, we found that there were numerous instances where parties had not adhered or complied to those rules and directions and we want to make it clear that they do so at their own risk.

Likewise, in *Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad*,<sup>18</sup> it was stated *inter alia*, that the failure to file the chronology of events as required by r. 18(10) of the Rules of the Court of Appeal 1994 as well as the Practice Direction No. 3 of 1992, renders the appellant's appeal not properly brought before the Court and thus, the appeal was dismissed forthwith with costs. In this case, there was also failure on the part of the appellant to comply with Practice Direction No. 2 of 1985 namely, failure to separately index the documentary exhibit in part 'C' of the record of appeal. Such non-compliance was held to be certainly fatal and the record of appeal struck out forthwith.

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16 [1995] 4 CLJ 484, CA. See also *Kerajaan Negeri Pahang Darul Makmur & Anor v. Seruan Gemilang Makmur Sdn Bhd* [2008] 1 LNS 417, CA.

17 [2000] 1 CLJ 269, CA.

18 [2010] 1 CLJ 444, CA.

## Conclusion

The implementation of mediation in civil courts in Malaysia was sanctioned by O. 34 r. 2(a) of the ROC 2012. The procedure is provided under the Practice Direction 2016 for all cases, save for accident cases which is governed by Practice Direction No. 2 of 2013. The commitment of the Malaysian Judiciary in promoting mediation can be seen with the setting up of the Kuala Lumpur Court Annexed Mediation Centre in 2011, followed by the Johor Bharu, Shah Alam, Penang and the latest, Ipoh Courts.<sup>19</sup> Mediation has also been used to solve matters at the appellate stage in the Court of Appeal and the Federal Court.<sup>20</sup>

In fact, in June 2016, the Federal Court Mediation Division was established. This Division is under the supervision of the Chief Registrar of the Federal Court of Malaysia where its primary task is to establish mediation centres in every state court and to regulate the operation of these centres. The existence of mediation alongside with the conventional adversarial adjudication provides opportunity to reach an amicable settlement even when a claim is filed at court; where at most times, a judgment would inevitably make a party to a dispute, to leave court disappointed. With no additional fee imposed, it is hoped that the members of the legal fraternity would play an important role by encouraging the disputing parties to seek an early resolution of their disputes by utilising the court-annexed mediation.

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19 See 'Half' of cases sent to mediation centres resolved' 22 Feb 2018 at <http://www.thesundaily.my>.

20 Tun Zaki Azmi 'Opening Address' at the 2nd Asian Mediation Association Conference (Kuala Lumpur, 24 February 2011).



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ISBN 978-967-457-144-3



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